No. 01-249

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DR. CARL BERNOFSKY,

Petitioner,

v.

THE ADMINISTRATORS OF THE
TULANE EDUCATIONAL FUND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent disagrees with Petitioner's questions presented for review. The appropriate questions are:

I. Should this Court disturb a district judge's decision not to recuse, which decision was affirmed, when the opinions of both the circuit court and the district court are squarely supported by the controlling law and the unique facts of this particular case?

II. Should this Court examine whether a negative reference letter can constitute an adverse employment action, as contemplated by Title VII of the Civil Rights Act of 1964, when neither court below ruled on that issue, but rather held that Petitioner had failed to present sufficient proof for a reasonable juror to find that the subject letter was actually "negative" or "retaliatory" on the facts of this case?

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The Administrators of The Tulane Educational Fund respectfully urge this Court to deny Dr. Carl Bernofsky's Petition for a Writ of Certiorari. Bernofsky's Petition asks the Court to review two fact-sensitive issues that are relevant only within the confines of the unusual facts of this particular case. First, the Petition seeks this Court's review on a recusal issue that Bernofsky has advanced and had rejected on four different occasions (eight including appeals), utilizing five different procedural vehicles — including motions to recuse, motions for reconsideration, appeals to the circuit court from adverse decisions, petitions seeking mandamus, and complaints of judicial misconduct. On each such occasion, the court — be it the District Court, the Court of Appeals, the Fifth Circuit Judicial Council, or this Honorable Court — found that conditions justifying recusal did not objectively exist. The instant Petition, representing Bernofsky's ninth time urging recusal, has no greater merit than the first eight and should be rejected.

For his second issue, Bernofsky entirely misstates the District Court's holding and frames the issue as being "[w]hether a negative reference letter by an ex-employer is an adverse employment action in a claim for retaliation under Title VII of the Civil Rights Act of 1964." (Petition at i.) Neither the District Court nor the Circuit Court ever reached or ruled upon this issue that Bernofsky now presents. The District Court's holding was that Bernofsky had utterly failed to adduce sufficient evidence to allow a reasonable juror to conclude — or even infer — that the letter at issue in this case was "retaliatory" or "negative." This is the holding that was affirmed on appeal. While Bernofsky would have this Court believe that the District Court "held" that a negative reference letter can never — on any set of facts — constitute an actionable adverse employment action under Title VII, that was simply not the holding. And this, therefore, is not the proper case for the Court to consider that question.

STATEMENT OF THE CASE

This is at least the fourth civil action that Bernofsky has filed against Tulane, and the second time that he has sought a Writ of Certiorari following adverse decisions, in his seemingly endless campaign of litigation against Tulane. For brevity's sake, Tulane adopts as its own the District Court's recitation of the salient facts. Tulane, however, offers the following undisputed facts to supplement its Statement of the Case.[1] In short, these facts demonstrate that this is a garden-variety retaliation and defamation case, instituted by a disgruntled former Tulane employee obsessed with revenge against his former employer and the recusal of a district judge who found his claims meritless.

As an untenured research professor, a position he held at Tulane from 1975 to 1995, Bernofsky was responsible for securing funds to support his research and salary. Such funds typically come from research grants, which for many years supported Bernofsky. By 1994, however, a Tulane faculty committee found that, in addition to failing in his general academic responsibilities, Bernofsky had been failing to generate grant funding sufficient to support his salary. (Petition at A3-4.) When this came to light, Bernofsky's department chair, Dr. James Karam, warned Bernofsky that the continued absence of sufficient grant funding would result in his research position being eliminated. (R.3, 718-724.)

In the Spring of 1995, Bernofsky was awarded a two-year research grant by the United States Air Force in the amount of $125,000 per year. Only $13,000 of that amount, however, was

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1. The District Court's Order & Reasons is reprinted at pages A2 through A24 of the Petition's Appendix, and will be cited herein as such.

earmarked to support Bernofsky's annual salary. This limited amount was insufficient to support Bernofsky's full salary and did not justify an ongoing research position. Tulane, therefore, eliminated Bernofsky's research post and thereby terminated his employment effective April 21, 1995. Bernofsky sued Tulane over this termination, alleging discrimination under 42 U.S.C. § 1981(b) and 29 U.S.C. § 623(d). The District Court, through the Honorable Helen G. Berrigan, granted summary judgment in Tulane's favor.[2] The Court of Appeals summarily affirmed that decision. This Court then denied Bernofsky's Petition seeking a Writ of Certiorari to address the merits of that case, and later denied a separate Petition seeking a Writ of Mandamus (Supreme Court No. 99-372) regarding recusal. *See generally Bernofsky v. Tulane Univ. Med. Sch.*, 962 F. Supp. 895 (E.D. La. 1997), *aff'd*, 136 F.3d 137 (5th Cir.) (table), *cert. denied*, 525 U.S. 813 (1998) ("Bernofsky I").

While Bernofsky I was pending in the District Court, Bernofsky applied for a new job at fifty-two (52) different academic institutions but was not granted any interviews. (R.3, 626.) Only two of the 52 institutions requested letters of reference from Tulane. Those institutions were the University of Houston and Michigan Technological. Neither had ongoing faculty searches; however, professors at each university who were long-time friends of Bernofsky were hoping to find him employment and contacted Tulane for references. (R.3, 628.)

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2. Judge Berrigan is the same judge whose recusal is at issue in the instant case. It was only after this summary judgment motion was granted that Bernofsky began urging recusal; first with motions to recuse and appeals from denials thereof and then with complaints of judicial misconduct and petitions seeking writs of mandamus. All such efforts, however, were rejected by the courts below and this Court on a petition for discretionary review.

Curiously, the Tulane reference contacts that Bernofsky had listed on his applications were Drs. Karam, Steele, and Stjernholm. Dr. Karam was the Department Head who terminated Bernofsky's employment, and was the person against whom Bernofsky had made highly personal allegations of discriminatory treatment in Bernofsky I. Drs. Steele and Stjernholm were both members of the faculty committee that had given the unflattering review of Bernofsky's faculty performance and grant funding, which review led to his discharge when Bernofsky failed to improve. None of these three professors knew that he had been listed as a reference by Bernofsky and none had given permission to be listed as such. (Petition at A7-8.)

On February 7, 1997, Dr. Ira Wolinsky, of the University of Houston, wrote to Drs. Karam, Steele, and Stjernholm requesting reference letters about his friend Bernofsky. (R.3, 740.) Knowing that Bernofsky was embroiled in litigation against Tulane at that time, and because Wolinsky's request was entirely unexpected, each of the professors contacted John R. Beal, Tulane's Associate General Counsel, for guidance. On behalf of each of the three professors, Beal responded to Wolinsky's request in a letter dated February 21, 1997 (hereinafter "the Beal letter"). In that letter, Mr. Beal explained that Bernofsky's research position at Tulane had been eliminated due solely to a "lack of research funds" and that Bernofsky's professional performance had not contributed to Tulane's decision to terminate his employment. (Petition at A7-A8.) Further, Beal specifically told Wolinsky that he should not infer anything negative from the fact that he (Beal) had responded to the inquiry, instead of the three individual professors. (Petition at A17.) This is the letter that Bernofsky made the cornerstone of his claims below.

He contended that the Beal letter prevented his obtaining employment at University of Houston; the only place that the letter was sent. It is undisputed, however, that the University of Houston did not have any openings, and was not conducting an active candidate search when Bernofsky applied. (Petition at A13.) Instead, Bernofsky applied there because he had known Dr. Wolinsky for 30 years, and hoped Wolinsky would help him find a new job. It is also undisputed that, even in the absence of the Beal letter, there was no guarantee that Bernofsky would have been hired at the University of Houston. (*Id.*) In fact, Bernofsky has repeatedly admitted that he has no proof that he would have been hired by any of the 52 institutions to which he applied, regardless of what Tulane might have said or done. (Tulane's Fifth Circuit Record Excerpt Tab 1 at 138-39, 141, 145, 160, 185).[3]

Michigan Technological University is the only other institution that requested written references from Tulane. It did so in a letter dated May 27, 1997 and penned by Dr. Wilbur H. Campbell, another long-time friend of Bernofsky's. (R.3, 739, 740, 748.) Tulane inadvertently failed to respond to Dr. Campbell's inquiry. (Petition at A18.) Neither Campbell nor Bernofsky ever contacted Tulane a second time requesting a response. Thus, the Beal letter is the only contact, written or oral, that occurred between anyone at Tulane and any of Dr. Bernofsky's alleged potential employers. (R.3, 750.)

Bernofsky relied upon the Beal letter, and Tulane's failure to respond to Michigan Technological, as the sole "adverse employment actions" in support of his Title VII claim that

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3. This citation is to Bernofsky's deposition testimony, and the citations are merely illustrative and not exhaustive.

Tulane unlawfully retaliated against him. Bernofsky also relied upon the Beal letter to support a claim of defamation under state law. After considering the matter on the briefs and at oral argument, the Court of Appeals affirmed the District Court's entry of summary judgment in favor of Tulane on each of Bernofsky's substantive claims. Also affirmed was the District Court's well-reasoned decision not to recuse herself from the case. Bernofsky's Petition seeks this Court's discretionary review of the Circuit Court's treatment on all three of these unremarkable issues. The Petition should be denied.

REASONS FOR DENYING THE WRIT

Both lower courts found, after giving Bernofsky the benefit of every factual and analytical doubt, thereby viewing all facts in the light most favorable to him, that he had failed to adduce legally adequate evidence to reveal a triable issue of fact and survive Tulane's Motion for Summary Judgment. Thus, summary judgment was entered and affirmed on these grounds.

The District Court decidedly did not, as Bernofsky argues, hold that a negative reference letter from a former employer can never legally constitute an "adverse employment action" under Title VII of the Civil Rights Act of 1964. To be sure, the District Court never reached that issue because it found that Bernofsky had failed to come forward with any significantly probative evidence from which a reasonable juror could find — or even reasonably infer — that the Beal letter was either retaliatory, negative, or defamatory. (Petition at A17-18.) Thus, the District Court simply exercised its responsibility under Rule 56(c) of the Federal Rules of Civil Procedure and found that Bernofsky

had failed to carry his burden of proof in opposing Tulane's properly supported Motion for Summary Judgment.[4]

Notwithstanding this detailed and fact-specific decision, Bernofsky intentionally misstates the District Court's "holding" as being the sweeping proclamation that negative reference letters do not constitute adverse employment actions under Title VII. Bernofsky does this in an effort to improperly raise what he perceives to be a circuit split on the issue. He then urges this Court to grant the instant Petition to address and resolve that perceived split. The truth of this matter is that, even if there is a circuit split on that discrete legal question, that question was not at issue in this case because the District Court found that Bernofsky's evidence was insufficient to get that far. The Court of Appeals agreed. (Petition at A30-31.) Thus, to grant the instant Petition to decide whether a negative reference letter is an adverse employment action would be to accept for review an issue on which neither the District Court nor the Court of Appeals ruled. Put another way, the sweeping legal issue that Bernofsky would have this Court resolve was never formally decided on this record and is a non-issue herein in the most literal meaning of that term.

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4. The District Court acted with equal judicial prudence in resolving Bernofsky's defamation claim. Despite the facial frivolity of the claim, in light of the evidentiary record below, the court trudged methodically through each element of the claim, refusing to short-cut to a conclusion without evaluating each angle from which Bernofsky might have had a cognizable claim. At each turn, however, the insufficiency of Bernofsky's summary judgment evidence doomed the claim. (Petition, at A20-A24.)

Despite Bernofsky's contention to the contrary, it is clear that the courts below viewed the relevant facts in the light most favorable to him as the non-moving party. The courts neither ignored nor failed to give effect to each bit of evidence upon which Bernofsky relied. The simple fact is that, as the District Court recognized, that Bernofsky's subjective perspective on his circumstances, and the "evidence" that flowed therefrom, did not amount to significantly probative evidence on each essential element of his claim — which properly compelled the entry of summary judgment in Tulane's favor.

Finally, the District Judge properly refused to recuse herself from presiding over Bernofsky's case. His sole recusal argument herein arises from Judge Berrigan's having agreed to teach a two-week summer school class in Greece for the Tulane Law School summer abroad program, and to accept $5,500 in reimbursement for her transportation, lodging, and living expenses during those two weeks. Judge Berrigan examined this situation in light of each of the legal sources of authority upon which Bernofsky relied, and found — in accordance with the proper objective standard — that recusal was neither required nor prudent given the unique facts and storied history of this case. Each of these reasons for denying Bernofsky's Petition is further discussed and supported below.

I. The Trial Court Properly Denied Bernofsky's Motion to Recuse

Bernofsky contends that Judge Berrigan should have recused herself solely because she had agreed to teach a summer school course at Tulane Law School's summer program in Greece during the summer of 2000. (Petition at

7-12.) The cornerstone of Bernofsky's argument is that the Law School agreed to reimburse Judge Berrigan, up to $5,500, for her transportation, lodging, and *per diem* expenses in connection with the course. (*Id.* at 7.) He argues that two different enactments required recusal in light of this arrangement, and that the courts below improperly decided this issue. First, Bernofsky maintains that 28 U.S.C. § 455(a) commanded recusal because the teaching post created a situation "in which [Judge Berrigan's] impartiality might reasonably be questioned." Second, he posits that *The Guide to Judiciary Policies and Procedures* mandates recusal for any "judge who teaches at a law school" any time "that institution [is] a party." (Petition at 10-11.)[5]

Title 28 U.S.C. § 455(a) provides, in pertinent part, that "[a]ny . . . judge of the United States shall disqualify [her]self in any proceeding in which [her] impartiality might reasonably be questioned." Similarly, the *Guide to Judiciary Policies and Procedures* provides that:

> A judge who teaches at a law school should recuse from all cases involving that educational institution as party [sic]. The judge should recuse (or remit) from cases involving the university, as well as those involving the law school, where the judge's impartiality *might reasonably be questioned* in view of the size and cohesiveness of the university, the degree of independence of

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5. The *Guide to Judiciary Policies & Procedures* is a publication of the Administrative Office of United States Courts, in which the *Code of Conduct for United States Judges* has been reprinted. *See In Re: Executive Office of the President*, 215 F.3d 25, 25-26 (D.C. Cir. 2000).

> the law school, the nature of the case, and related factors. Similar factors govern recusal of judges serving on a university advisory board.

(emphasis added). This is essentially the same "reasonableness" standard embodied in 28 U.S.C. § 455(a). Although Bernofsky offers Section 455(a) and the foregoing rule as separate, independent grounds for recusal, they actually impose the same standard and merge analytically — requiring recusal only when a reasonable person would be led to doubt the judge's impartiality, upon being apprised of *all* relevant circumstances. *E.g.*, *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) (emphasis added).

When these rules are invoked, the judge to whom a motion to recuse is directed is the one entrusted to apply this objective test because he or she is most familiar with all of the circumstances surrounding the alleged bias or conflict of interest. *Chitimacha Tribe of La. v. Harry L. Laws Co.*, 690 F.2d 1157, 1162 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). In recently elaborating upon how district judges should apply the test, the Court of Appeals explained that they should "ask how [the] facts appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person." *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995) (citing *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990)); *accord Valley v. Rapides Parish Sch. Bd.*, 992 F. Supp. 848, 850 (W.D. La. 1998), *vacated on other grounds*, 169 F.3d 216 (5th Cir. 1999).

In light of this standard, the recusal issue in the instant case was whether a fully-informed, reasonable observer would harbor doubts about Judge Berrigan's impartiality.

The District Court acknowledged the foregoing standard, evaluated the totality of the circumstances and exercised its discretion to decline Bernofsky's invitation to recuse. (Petition at A 25-29.) On appeal, it was Bernofsky's burden to prove that Judge Berrigan abused her broad discretion. *See United States v. Monroe*, 178 F.3d 304, 309 (5th Cir.), *cert. denied*, 528 U.S. 1010 (1999) (movant's burden to prove abuse of discretion in the first instance; with the resulting order to be weighed against a "harmless error" standard if successful). The Court of Appeals reviewed the record, heard oral argument, and affirmed Judge Berrigan's decision for the same reasons she gave in her opinion. Tulane respectfully submits that nothing in the factual record or controlling law warrants this Court's review on this stale recusal question. However, because Bernofsky has raised what are essentially five (5) sub-reasons that allegedly justify his Petition's being granted, Tulane addresses them below.

First, Bernofsky intimates that Judge Berrigan should have recused herself because "there is prestige in being asked to participate in the program whose past participants included five Justices of the U.S. Supreme Court." (Petition at 8.) There is, however, no case law interpreting any recusal statute suggesting that "prestige" is grounds for recusal when the overall circumstances would not move the fully informed, reasonable person to question the judge's partiality. To the contrary, however, there is jurisprudence finding that such prestige does not warrant recusal when the overall circumstances do not suggest an absence of impartiality. *Carter v. West Publ'g Co.*, No. 99-11959-EE, 1999 WL 994997 at *4 (11th Cir. November 1, 1999) (Tjoflat, J.). Thus, the presence of "prestige" without more does not justify granting the instant Petition because, objectively, no reasonable person apprised of all relevant facts could question Judge Berrigan's impartiality on that basis.

Next, Bernofsky contends that Justice Scalia's not having participated in two decisions involving Tulane (Supreme Court Nos. 00-789 and 00-996) necessarily means that Judge Berrigan should have recused herself as well. *See generally Rubinstein v. Administrators of the Tulane Educ. Fund*, 218 F.3d 392 (5th Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 1393 (2001) (both cases). Bernofsky has apparently seized upon language at the bottom of the March 19, 2001 Order denying the *Rubinstein* Petitions, which states "Justice Scalia took no part in the consideration or decision of this petition." Bernofsky assumes that this necessarily means that Justice Scalia "recused himself" because of his past or future participation in the Tulane Summer Law School Program. (Petition at 8-9.) To the contrary, the undersigned is informed by the Clerk of this Honorable Court that the same language is used in every case in which a justice chooses not to participate in a decision — be it for an interest-based reason or otherwise — and that such reasons are not disclosed. As such, Bernofsky's reliance upon this language assumes facts that are not anywhere in this record, which renders his argument misplaced and unpersuasive.[6] His position is further eroded because the other sitting Justices, who Bernofsky admits also taught at the same Tulane Summer Program, participated in the *Rubinstein* decisions without comment or

6. Bernofsky also intimates that the undersigned intentionally concealed knowledge of Justice Scalia's "recusal" in the *Rubinstein* matters. This is untrue in the first instance and irrelevant beyond that. The undersigned had not so much as noticed whether any Justices did not participate in the decisions because there were no recusal issues in those cases. Moreover, had the *Rubinstein* petitions been granted, Justice Scalia's not having participated at the petition stage would not have foreclosed his ability to participate in the case on the merits. Bernofsky's emphasis on Justice Scalia's decision not to participate in the *Rubinstein* petitions is weightless as a basis for justifying this Court's review of the sound recusal decisions rendered below in this case.

reservation. Accordingly, Justice Scalia's decision not to participate in *Rubinstein* offers no reason to disturb the recusal decision raised in the instant Petition.

Bernofsky next contends that recusal questions must be viewed from the standpoint of "the average person on the street." (Petition at 10.) While this is an applicable recusal standard, Bernofsky forgets that this hypothetical average person on the street is presumed to know *all* of the pertinent facts surrounding the proposed recusal. *Potashnick*, 609 F.2d at 1111. The fact that Judge Berrigan had spent several years becoming familiar with Bernofsky, his tactics, and his line of cases against Tulane strongly weighed in favor of her decision to deny Bernofsky's Motion to Recuse. (Petition at A28 n.3.) Indeed, the District Court properly found that, when so many scarce judicial resources have been devoted to a particular matter, the Court essentially owes a duty not to recuse. (*Id.*) Because Bernofsky insists on advocating the foregoing rule without considering all pertinent facts, this argument on the recusal question adds nothing to support the instant Petition's being granted.

Bernofsky next suggests that because three other district judges had recused themselves in this matter, Judge Berrigan should have done so as well. (Petition at 11-12.) Bernofsky, however, again leaves out the most pertinent details. Not only were those judges' individual circumstances very different from that of Judge Berrigan, the applicable legal standard charges each judge to separately evaluate his/her own personal circumstances and resolve the recusal question on that basis, not based upon what other judges have done. *See Jordan*, 49 F.3d at 157 ("each 455(a) case is extremely fact-intensive and fact bound, and must be judged on its unique facts and circumstances more than by comparison to

situations considered in prior jurisprudence").[7] Thus, that other judges chose to recuse is truly irrelevant, and illustrative of nothing, with respect to whether Judge Berrigan's decision was proper. As such, their actions do not offer this Court any reason to disturb the sound recusal decisions below.

Finally, while *he* is the party seeking recusal, Bernofsky incredulously contends that "the burden of producing evidence of attenuation in [the relationship between Tulane University and its law school], if any, would be upon Tulane and not Dr. Bernofsky." (Petition at 11.) Clearly, as the party seeking recusal, all burdens of proof and production rest soundly with Dr. Bernofsky. *E.g.*, *Pope v. Federal Express Corp.*, 974 F.2d 982, 985 (8th Cir. 1992). He has not met these burdens on the record below, and any current arguments in favor of recusal remain inadequate to justify granting the instant Petition.

For all of the foregoing reasons, the lower courts' decisions with respect to recusal were factually and legally correct. The Petition on this issue should be denied.

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7. Of the other judges to which Bernofsky refers, Magistrate Judge Lance M. Africk's wife is a physician employed full-time by Tulane's Medical School, where Bernofsky worked, and Magistrate Judges Ivan L.R. Lemelle (now a District Judge) and Joseph C. Wilkinson, Jr. were both regular members of the Tulane Law School adjunct faculty. While these situations are objectively different than Judge Berrigan's, her decision cannot be judged against theirs because she is charged to decide whether recusal is proper based upon all of the facts as she knows them. *Chitimacha Tribe*, 690 F.2d at 1162. The Court of Appeals recognized this and rejected Bernofsky's argument, as should this Court.

II. Bernofsky's Second Question Presented is Irrelevant to this Case

Bernofsky frames his second and final Question Presented as being "whether a negative reference letter by an ex-employer is an adverse employment action in a claim for retaliation under Title VII of the Civil Rights Act of 1964." (Petition at i.) Because neither court below decided this issue, it is an entirely irrelevant question in this case and an improper basis for granting the Petition.

Bernofsky manufactured this question by incorrectly stating that "[t]he district court held that a negative reference letter is not an adverse employment action." (Petition at 12.) This entirely misstates the District Court's holding. While the District Court discussed how the Fifth Circuit's view of what constitutes an adverse employment action under Title VII is more narrow than other circuits, it did so only in dicta. (Petition at A11-A14.) The court further noted that the Fifth Circuit *had not yet decided* whether a negative reference letter is an adverse employment action under Title VII. The District Court, therefore, merely surmised that such a letter may not meet that threshold given the Fifth Circuit's more restrictive definition of that legally-charged term. But it did not resolve Bernofsky's retaliation claim on these grounds. (*Id.*)

Much to the contrary, the District Court's ultimate conclusion did not at all depend upon the substantive issue of whether a negative reference letter would or would not, standing alone, constitute an actionable adverse employment action. Instead, an evidentiary failure moved the District Court to grant Tulane's Motion for Summary Judgment. (Petition at A14-A17.)

Specifically, the District Court reasoned that, for any retaliation claim based upon the Beal letter to survive Tulane's Motion, Bernofsky would need significantly probative evidence that the letter was, in fact, "negative" and "retaliatory." On this score, the District Court evaluated the letter in light of the other evidence of record. (Petition at A14-18.) In doing so, the court properly noted that Bernofsky's only two complaints about the Beal letter were its statements that he had sued Dr. Karam "personally" and that his research position was eliminated because he did not have "any" research funds left. (*Id.* at A14-15.) The District Court correctly concluded, in light of all of the evidence of record, that the two statements that Bernofsky challenged were "substantially true" and that the Beal letter as a whole "paint[ed] a[n] unduly rosy picture as to his termination." (*Id.* at A17.) As such, the court found that Bernofsky had failed to come forward with summary-judgment evidence sufficient to allow a reasonable factfinder to conclude that the Beal letter was "negative" in a way that could possibly support a claim for retaliation or defamation. (*Id.* at A17-18.)

Similarly, the District Court properly found that Bernofsky had failed to offer significantly probative proof that the Beal letter or Tulane's lack of response to Campbell was actually "retaliatory." (*Id.* at A18.) The District Court specifically found that "[*e*]*ven if* the two disputed statements in Beal's letter can be construed as inaccurate, in the overall context, the plaintiff cannot establish that they were retaliatory." (*Id.* at A16.) (emphasis added). In reaching this conclusion, the court examined and recapped all of the evidence of record surrounding Bernofsky's inability to generate grant funding and his allegations against Karam. The court also considered the abundant, undisputed evidence

that Tulane submitted attesting to the myriad of other maladies plaguing Bernofsky's service to Tulane. The Court found it significant that, despite the litany of negative things that *could* have been legitimately included "[n]one of this was expressed in the Beal letter. In fact, to the extent Beal's letter is inaccurate, it is inaccurate in Bernofsky's favor . . . ." (*Id.* at A17.) Finally, the District Court underscored the evidentiary uselessness of the Beal letter, the prized cornerstone of Bernofsky's retaliation claim, as follows:

> The fact that Bernofsky has to parse Beal's letter so finely to criticize it only underscores the thundering absence of what Beal could have said had he wished Bernofsky ill. The Beal letter not only is not retaliatory, but it bends over backwards not to cause him harm.

(Petition at A18.)

The District Court clearly considered the entire record of evidence, set forth its findings in great detail, and found that Bernofsky simply could not prove that the Beal letter or Tulane's inaction in response to Campbell was negative or retaliatory. Those two elements were essential to Bernofsky's retaliation claim; and without significantly probative evidence on either one, Tulane's Motion was properly granted. *See Celotex Corp. v. Catrett*, 407 U.S. 317, 322 (1986) (summary judgment mandated against party failing to come forward with sufficiently probative proof supporting each element on which that party would bear the burden of proof at trial); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (same). This finding was summarily affirmed.

And despite Bernofsky's continued protestations that the District Court's treatment runs afoul of this Court's recent decision in *Reeves*, the record entirely belies that assertion. Bernofsky reads *Reeves* to require that summary judgment be denied in every case in which a plaintiff offers *any* "alleged evidence" to support his claims. This argument fails because neither Rule 56 of the Federal Rules of Civil Procedure nor this Court's interpretive jurisprudence thereon, including *Reeves*, requires district courts to abandon all sense of reasonableness in viewing summary judgment facts in the light most favorable to the non-mover. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000). The District Court in this case gave Bernofsky the benefit of every factual and analytical doubt in resolving Tulane's Motion — for which reason Bernofsky's retaliation and defamation claims failed and the courts below should be affirmed.

While the foregoing points are sufficient to justify this Court's denying the instant Petition, Tulane is compelled by this Court's practice rules to also respond to the specific points that Bernofsky raises. (Supreme Court Rule 15(2)). For example, Bernofsky contends that this Court should "examine what constitutes an adverse employment action in retaliation cases" because of a perceived split in the circuits. (Petition at 13.) Because this issue was not one that either court below relied upon in rendering its ruling, this issue is not before the Court on the instant record. As such, it cannot support a decision to grant the Petition in this case because the perceived split in the circuits, to the extent that it actually exists, had no effect on the decisions below.[8]

8. Because the circuit split that Bernofsky depends upon for his Second Question Presented is truly a non-issue in this case, Tulane has not responded to his treatment of several cases that he claims (Cont'd)

Along these same lines, Bernofsky also contends that the Fifth Circuit improperly "sidestepped the issue of whether the negative reference letter is an adverse employment action. . . ." (Petition at 19.) To the contrary, the Fifth Circuit did not "sidestep" any issue; the question that Bernofsky raises was simply not an issue in resolving this case. His continual refusal to acknowledge this fact is the sole reason for most of what is presented in the Petition. The resolution of the instant case had nothing at all to do with what does or does not constitute an adverse employment action when it comes to negative reference letters. This case was solely resolved on the grounds that Bernofsky had failed to come forth with significantly probative proof that the Beal letter was negative, defamatory, or retaliatory, such that he could survive Tulane's properly supported motion for summary judgment. (Petition at A13-A17.)

Finally, since these proceedings began, Bernofsky has improperly raised and relied upon this Court's decision in *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997). While Bernofsky contends that this case constitutes precedent for the position he advocates, Bernofsky entirely misapprehends the substance and scope of *Robinson*. That case stands, as this Court intended, solely for the very narrow proposition that Title VII applies with equal force to current employees and former employees. *Id.* at 346. Bernofsky has attempted to transform that narrow holding into a sweeping proclamation that any allegation that a

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(Cont'd)
confirm the split. To have responded would only have added to the considerable amount of irrelevant material that Bernofsky has already presented on this non-issue. In the unlikely event that the Petition is granted, however, Tulane reserves its right to address those issues on the merits.

negative reference letter from a former employer precluded a plaintiff's obtaining new employment should *always* proceed and succeed in the courts. Clearly, this is an overstatement of *Robinson*'s narrow holding and does not justify granting the Petition in this case.

CONCLUSION

The instant Petition seeks only personalized justice. The District Court summed up this point long ago when it wrote

> Dr. Bernofsky may have a deep-seated and heartfelt need to re-litigate the issue of why he was terminated at Tulane. However, his opportunity has come and gone. He cannot resurrect the issue in the carefully worded letter from Tulane to Bernofsky's friend at UH regarding a non-existent position, or from Tulane's silence with regard to MT's request.

(Petition at A24.) The District Court reviewed every piece of evidence that Bernofsky relied upon in opposing Tulane's Motion for Summary Judgment; and it viewed that evidence from every possible angle and analytical posture that might have given substantive credence to his claims. Having done so, the District Court faithfully exhausted its responsibilities in the face of a motion for summary judgment, memorialized its carefully-reasoned findings and concluded that Bernofsky's claims were insufficiently supported to proceed to trial. That finding was correct and was affirmed. Similarly affirmed was the District Court's decision not to recuse, parts of which decision had been addressed and affirmed on several prior occasions. Bernofsky has failed to offer this Court any

reason, much less any compelling reason, why the judgments below should be disturbed on the unique, almost bizarre, facts of this case. The Petition should, therefore, be denied.

Respectfully submitted,

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